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No. 84-1601

In The
Supreme Court of the United States
October Term, 1984

AETNA LIFE INSURANCE CO.,
Appellant,

vs.

MARGARET W. LAVOIE and ROGER J. LAVOIE, SR.,
Appellees.

~~MOTION OF~~ ALABAMA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF AND AMICUS BRIEF IN OPPOSITION TO APPELLANT AETNA LIFE INSURANCE CO.

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MOTION OF ALABAMA TRIAL LAWYERS ASSOCIATION FOR LEAVE TO FILE AMICUS BRIEF

—o—

Comes now the Alabama Trial Lawyers Association and files this Motion for Leave to file an Amicus Brief in this cause. The members of the Alabama Trial Lawyers Association represent numerous citizens of the State of Alabama who have been injured or damaged by the wrongful conduct of others. In many instances the continuation of the citizens' basic enjoyment of life depends wholly upon due process being afforded them by the Alabama courts.

The precedent which the appellant seeks to establish regarding recusal has serious consequences to our judicial

system and the due process rights of the citizens of Alabama. These issues deserve to be addressed fully by all interested parties. It is the desire of the Alabama Trial Lawyers Association to provide assistance to the Court on the recusal issues raised by the appellant.

Consent has been obtained from appellees and appellant in this case.

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TABLE OF CONTENTS

	Page
Table of Authorities	ii
Statement of Interest	1
Statement of Issues and Statement of the Case	1
Argument	
A. The Historical Basis for Disqualification of Judges	2
B. American Practice On The Issue of Disqualification of Judges	3
C. Disqualification Practice In Alabama	6
D. The Determination of the Qualification to Sit	10
E. Recusal Only Required Where Reasonable Basis for Questioning Impartiality Exists	12
Conclusion	14

TABLE OF AUTHORITIES

Page

CASES:

Acromag-Viking v. Blalock, 255 U.S. 22 (1921) 7

Anonymous, 91 Eng. Rep. 343 (K.B. 1698) 3

Berger v. United States, 255 U.S. 22 (1921) 4, 12

Blue Cross and Blue Shield of Alabama v. Granger, 461 So.2d 1320 (Ala. 1984) 8, 9

Brooks v. United States, 458 A.2d 66 (D.C. App. 1983) 5

Churchill v. Board of Trustees, 409 So.2d 1382 (Ala. 1982) 8

City of Bangor v. American Federation State, County and Mun. Employees, 449 A.2d 1129 (Me. 1982) 5

City of Grafton v. Holt, 52 S.E. 21 (W.Va. 1905) 4

Dr. Bonham's Case, 77 Eng. Rep. 638 (K.B. 1608) 3

Duncan v. Johnson, 338 So.2d 1243 (Ala. 1976) 8

Eisler v. United States, 170 F.2d 273 (D.C. Cir. 1973) 5

Evans v. Gore, 253 U.S. 245 (1920) 4

Ex Parte Bynum, 348 So.2d 828 (Ala. 1977) 9

Ex Parte State Bar Association, 92 Ala. 113, 80 So. 768 (1890) 7

Ex Parte Alabama Power Co., 280 Ala. 586, 196 So.2d 702 (1967) 8

Ex Parte Roach, 414 So.2d 80 (Ala. 1982) 8

Federated Guaranty Life Ins. Co. v. Wilkens, 435 So.2d 10 (Ala. 1983) 9

Ferguson v. Brown, 21 So. 603 (Miss. 1897) 5

Gaer v. Bank of Baker, 107 P. 2d 877 (Mont. 1941) 4

Gill v. State, 61 Ala. 169 (1879) 7

TABLE OF AUTHORITIES—Continued

	Page
Grimes v. United States, 396 F.2d 331 (9th Cir. 1968)	12
Hartman v. Board of Trustees of the University of Alabama, 436 So.2d 837 (Ala. 1983)	8
Hawaii-Pacific Venture Capital Corp. v. Rothbard, 437 F. Supp. 230 (D. Hawaii), appeal dismissed, 564 F.2d 1343 (9th Cir. 1977)	12
Herston v. Whitesill, 348 So.2d 1054 (Ala. 1977)	9
In Re Estate of Carlton, 378 So.2d 1212 (Fla. 1979), *cert. denied Hayes v. Rogers*, 447 U.S. 922 (1980)	10
In Re Sheffield, 465 So.2d 350 (Ala. 1984)	8
Johnson v. Salem Corp., 458 A.2d 1290 (N.J. Super. Ct. App. Div. 1983)	6
Kostal v. People, 414 P.2d 123 (Colo. 1966), *cert. denied* 385 U.S. 939	5
Laird v. Tatum, 409 U.S. 824 (1972)	5, 12
Lowrey v. State, 317 So.2d 360 (Ala. 1975)	9
Lyons v. United States, 325 F.2d 370 (9th Cir. 1964)	5
National Savings Life Ins. Co. v. Dutton, 419 So.2d 1357 (Ala. 1982)	9
People v. Yeager, 359 P.2d 261 (Cal. 1961)	6
Peters v. Meeks, 171 So.2d 562 (Fla. Dist. Ct. App. 1964)	4
Petrey v. Holliday, 199 S.W. 67 (KY. 1917)	4
Prawdzik v. Grand Rapids, 21 N.W. 2d (Mich. 1946)	4
Queen v. Meyer, 1 Q.B.D. 173 (1875)	3
Roach v. Bynum, 403 So.2d 187 (Ala. 1981)	8
Scott v. Beams, 122 F.2d 777 (C.C.A. 10th, 1941)	5
Shadid v. Oklahoma City, 494 F.2d 1267 (10th Cir. 1974)	12

TABLE OF AUTHORITIES—Continued

	Page
State v. Chillingworth, 116 So. 633 (Fla. 1928)	4
State ex rel. Anaya v. Scarborough, 410 P.2d 232 (N.M. 1966)	5
State v. Dept. of Pensions and Securities, 421 So.2d 129 (Ala. Civ. App. 1982)	5
Tynan v. United States, 376 F.2d 761 (P.C. Cir. 1967)	5
United States v. Gilboy, 162 F. Supp. 384 (M.D. Penn. 1958)	5
United States v. Grinnel Corp., 384 U.S. 563 (1966)	5
United States v. Ramos, 291 F. Supp. 71 (D.R.I. 1968)	6
Wallace v. Wallace, 352 So.2d 1376 (Ala. Civ. App. 1977)	8
Walker v. People, 248 P.2d 287 (Colo. 1952)	5
Woodmen of the World v. Alford, 206 Ala. 18, 89 So. 528 (1920)	7
STATUTES:	
28 U.S.C. § 455	6
Cal. Civ. Proc. Code § 170 (1)	4
MISCELLANEOUS:	
Alabama Canons of Judicial Ethics 3C(1)	6, 7, 13
American Bar Association Standards Relating to Appellate Courts § 3.42	10, 12
3 W. BLACKSTONE, COMMENTARIES *361	3
4 BRACTON, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (Woodbine's ed. 1942) 281	3
Co. Litt*141a	2

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AMICUS BRIEF OF ALABAMA TRIAL LAWYERS ASSOCIATION IN OPPOSITION TO APPELLANT AETNA LIFE INSURANCE CO.

STATEMENT OF THE CASE

The members of the Alabama Trial Lawyers Association represent numerous citizens of the State of Alabama who have been injured or damaged by the wrongful conduct of others. In many instances the continuation of the

citizens basic enjoyment of life depends wholly upon due process being afforded them by the Alabama courts.

The precedent which the petitioners seek to establish regarding recusal has serious consequences to our judicial system and the due process rights of the citizens of Alabama. These issues deserve to be addressed fully by all interested parties.

STATEMENT OF ISSUES AND STATEMENT OF THE CASE

The statement of issues and statement of the case presented by the Lavoies in brief are adopted. This brief addresses only the disqualification issue, i.e., whether the Justices of the Alabama Supreme Court were required to recuse themselves when no one of the Justices had any interests, direct or incidental, in this case.

ARGUMENT

A. The Historical Basis For Disqualification of Judges.

No man shall be a judge in his own case.[1]

Although judicial disqualification finds its origins in the early days of recorded history, legal scholars of all ages have disagreed about its scope. At early common

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[1]Co. Litt*141a

law, a judge was required to recuse himself only when he had a direct pecuniary interest in the subject matter of the litigation. Frank, *Disqualification of Judges,* 56 Yale L.J. 605, 611-12 (1947). Thus, a judge was disqualified because he received the fine which he had the power to inflict, *Dr. Bonhams Case,* 77 Eng. Rep. 638 (K.B. 1608); and also when a judge sat in an ejectment case in which he was the lessor of the plaintiff, *Anonymous,* 91 Eng. Rep. 343 (K. B. 1698). Bracton's view that mere suspicion was a basis for disqualification[2] was not accepted.[3]

Obviously, the common law basis for disqualification was insufficient to guaranty justice to litigants in the variety of situations wherein a judge might have an interest not of a strictly pecuniary nature. Notwithstanding the common law over-idealization of a judge's capacity for impartiality, nineteenth-century English courts recognized that when a judge had a substantial interest in the outcome of the litigation, whether pecuniary or otherwise, disqualification was in order. *The Queen v. Meyer,* 1 Q.B.D. 173 (1875).

B. American Practice On The Issue Of Disqualification Of Judges.

American experience has wisely broadened disqualification practice to include many situations where a judge's interest in a case is other than pecuniary. There are three general categories of cases where a judge's dis-

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[2]4 Bracton, DE LEGIBUS ET CONSUETUDINIBUS ANGLIAE (Woodbine's ed. 1942) 281.

[3]3 W. BLACKSTONE, COMMENTARIES *361.

Grimshaw v. Ford Motor Company, 119 Cal.App.3d 757 (1981) [Manufacturer refused to recall defective gas tanks on Pintos — cheaper to pay death claims than to correct the defect. (Ford calculated that it was cheaper to let people die than to make an $11.00 repair).]; *Vossler v. Richards Manufacturing Company*, 143 Cal.App.3d 952 (1983) [Medical implant defect concealed by manufacturer to maintain "share of market" — patients require second surgery after breakdown of implant.]; *Tibbs v. Great American Insurance Company*, 775 F.2d 1370 (9th Cir. 1984) [Refusal to investigate insurance claim or provide legal defense, company's response to judge's advice to provide legal defense — "F__ the Judge" and "no court of law is going to tell us what to do."]; *Taylor v. Superior Court*, 24 Cal.3d 890 (1979) [Punitive damages recoverable for injuries imposed by drunk driver — drunk driving not considered "mere negligence."]; *Nolin v. National Convenience Stores, Inc.*, 95 Cal.App.3d 279 (1979) [Refusal to perform maintenance and subsequent negligence — company's position "We have a team of lawyers that would tie it up in court for years."]

It could even be said that the position of appellant/*amici* in this action is that they want to know how expensive it's going to be to commit outrageous acts so that they can build certainty into their long-range financial planning. One of the most important purposes of punitive damages is to make wrongful conduct less cost effective and deny tortfeasors the certain profit for which they strive. The one certainty that can be gained from the *amici* presentation of statistics is that there is a great deal of tortious and unconscionable conduct which is being exposed and deterred. The fact appellants and their *amici* are seeking the present requested relief tends to document the fact that the therapeutic value of these verdicts is starting to take effect.

The uniqueness of appellants/*amici's* position relative to punitive damages in turn begs the question, if more criminals are convicted and punished this year, should we increase the prosecutor's burden and afford the defendants greater protection next year? Defendants faced with a potential punitive dilemma have two adequate remedies: (1) employ the current defenses and civil procedures available to them, or (2) abandon the wrongful malicious conduct which they have exhibited in a wide variety of cases.

A. PUNITIVE DAMAGES DO NOT CONSTITUTE A CRIMINAL PENALTY.

Appellants and *amici*, on behalf of appellants, argue that punitive damages are the functional equivalent of criminal penalties, and, therefore, defendants should be afforded heightened due process safeguards and the protection afforded by the Excessive Fines Clause of the Eighth Amendment. It is significant to note, appellant and *amici* on behalf of appellant cite not a single case which supports this position. Cases cited are not even remotely in point and their arguments ignore, as if they do not exist or stand, the landmark precedents on the questions of the constitutionality of punitive damages.

The concept of punitive damages, and the jury's power to assess such damages, has been part of the law since as early as 1763. *Huckle v. Money*, (2 Wils., K.B. 205) declared:

> The personal injury done to the [plaintiff] . . . was very small, so that if the jury had been confined by their oath. . . perhaps [20 pounds] damages would have been thought damages sufficient; but the small injury done to the plaintiff. . . did not appear to the jury in that striking light which the

> great point of law, touching the liberty of the subject, appeared to them at the trial . . . I think they have done right in giving exemplary damages. To enter a man's house by virtue of a nameless warrant in order to procure evidence, is worse than the Spanish Inquisition; a law under which no Englishmen would wish to live an hour; it was a most daring public attack upon the liberty of the subjects.

The *Huckle* reasoning, an expression of "societal disapproval," has become the basis for our concept of punitive damages. In 1851, this court upheld the reasoning of *Huckle*, the propriety of punitive damages and the jury's power to award such damages. *Day v. Woodworth*, 54 U.S. (13 HOW.) 363, 370-371 (1851).

More recently, in *Curtis Publishing Company v. Butts*, 388 U.S. 130, 159 (1967), this Court readdressed the constitutionality of punitive damages finding that "the Constitution presents no general bar to the assessment of punitive damages in a civil case."

Although the label "punitive" has criminal connotations, it has long been recognized that such damages are civil and exemplary in nature, customarily imposed as a civil sanction. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). These exemplary damage matters have traditionally been administered by the civil rather than the criminal branch of the courts, and have been subject to all the requirements of due process of law. To characterize exemplary damages as criminal fines is contrary to the fact as well as the state's legislative intent, where legislation has provided the foundational basis for punitive damages.

Appellants seem to base their characterization of punitive damages on an erroneous conclusion that because punitive

damages act as punishment, as do criminal penalties, then they too must conclusively be characterized as criminal in nature.

Punitive damages may act as a form of punishment, however, this is but one of the multiple functions which they serve. All civil fines or penalties which act to punish are not penal. See *Ingraham v. Wright*, 430 U.S. 651, 670 n. 39 (1977); *Gertz v. Welch*, 418 U.S. at 350; *Atlas Roofing Co. v. OSHRC*, 430 U.S. 442, 460 (1977). In fact, if a civil sanction serves a broader remedial goal, which is to protect important societal interests, the sanction cannot be characterized as criminal. See *Helvering v. Mitchell*, 303 U.S. 391, 399-401 (1938).

In *Helvering*, the Court found that a tax penalty assessed against a defendant for tax fraud was not criminal because the statute was considered *remedial* in character. The penalty was considered remedial because its purpose was preventative, to safeguard the revenue, as well as reparative, to reimburse the government. *Id.* at 401.

If, however, a law's primary purpose is "retribution," absent any societal benefit, then the law can be considered criminal in character. *Kennedy v. Mendoza - Martinez*, 372 U.S. 144, 182 (1963). In *Kennedy*, the Court held that stripping an American of his citizenship for draft evasion was a form of criminal punishment. In reaching this conclusion the Court examined the intent of the Legislature in passing the statute. The Court concluded that the intent was primarily retributive in nature. The statute did not serve any other goals, such as promoting societal good, military morale, or the conduct of the war generally. *Id.* at 182. Thus, absent these other broader goals, the Court found the statute to be criminal.

Similarly, in *Curtis*, 388 U.S. at 167, this Court in upholding the constitutionality of punitive damages, analyzed the remedial function of such damages. Chief Justice Harlan noted that when punitive damages serve a wholly legitimate purpose of protecting an individual's reputation, misconduct sufficient to justify the award of compensatory damages also justifies the imposition of a punitive damage award.

These cases demonstrate that when a law serves a legitimate governmental goal, even if a fine or sanction is imposed as a means of achieving that goal, the law should not be characterized as penal.

Punitive damages have long served a multiplicity of important societal goals, including general deterrence, regulation, and reformation.

As this Court recognized in *San Diego Union v. Garmon*, 359 U.S. 236, 247 (1959):

> [R]egulation can be as effectively exerted through an award of damages as through some form of preventive relief. The obligation to pay compensation can be, indeed is designed to be, a potent method of governing conduct and controlling policy.

Punitive damages have, in fact, acted as a successful and vital means of regulating and reforming undesirable conduct. The punitive damage award has acquired the "characteristics of a strong, silent, consumer public advocate. . . . This essential and crucial body of common law, marked by relative simplicity, is playing an increasingly significant role in protecting contemporary society from many non-regulated or inadequately regulated businesses and industries." Levine, *Demonstrating and Preserving the Deterrent Effect of Punitive Damages in*

Insurance Bad Faith Actions. 13 U.S.F.L. Rev. 613, 615 (1979).

A review of the response of the insurance industry reflects the important regulatory and reformatory function of punitive damages awards. The response of the industry is best reflected by the observation that "[t]he specter of recent punitive damage awards against insurance companies, most of which have occurred in California, is awesome. They have resulted in a shock wave throughout the insurance industry which is not measurable on the Richter Scale." Kornblum & Thornton, *The Seismic Impact of Punitive Damages in Actions Against Insurers*, 77 Best's Rev. 36, 44 (1976).

As a result of these verdicts, insurers who were being inadequately regulated by administrative agencies, are now being regulated and the conduct of the entire insurance industry is being reformed to conform to the reasonable interests and expectations of the public.[1]

Punitive damages are serving a similar function in the manufacturing industry. In this area, punitive damages have acted to regulate and reform reprehensible conduct with the goal and effect of making products safer for individuals and the consuming society. See Owens, *The Doctrine of Punitive Damages*, 74 Mich. L.Rev. 1257, 1282-1287 (1976).

Certainly the functions being served in both the insurance and manufacturing industries are legitimate and worthy goals satisfying basic contemporary needs of our society. These are but two of many examples where punitive damages are serving a broad therapeutic function of

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[1] See Levine, *supra*, at 621-627, for a comprehensive review and analysis of the insurance industry's response to punitive damage awards.

regulating and reforming conduct, independent of any form of punishment.

Moreover, it is significant to note, these societal goals are being reached through the use of sanctions, the cost of which is being borne by the wrongdoer and not society. "Comparing the regulatory function of punitive damages verdicts to the function of 'regulatory' agencies reflects the effective simplicity of exemplary damages rules of law administered by judges and jurors and the ineffective complexity in the maize of administrative agencies and regulations. Paradoxically, from an economic perspective, the cost of regulation through a punitive damage sanction is borne by the insurer acting wrongfully and not by taxpayers supporting an ineffective administrative agency." Levine, *supra*, at 627 (1979).

In contrast, the cost of protecting society through the use of a criminal penalty is borne by society, which demonstrates another significant distinction between criminal penalties and civil sanctions.

In addition to the important goals of reformation and regulation, punitive damages serve a compensatory function which is unrelated to any form of punishment. In many instances punitive damages serve to reimburse the plaintiff for losses which are not ordinarily recoverable as compensatory damages. These might be actual losses plaintiff is unable to prove or for which the rules of damages do not provide relief, including the legal fees and expenses of bringing a lawsuit. Owens, *supra*, at 1295; Note, *The Imposition of Punishment by Civil Courts: A Reappraisal of Punitive Damages*, 41 N.Y.U.L. Rev. 1158, 1163 (1966).[2]

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[2] For example, in *Gulf Atlantic Life Insurance Co. v. Barnes*, 405 So.

An additional distinguishing characteristic of a criminal penalty, as opposed to a civil sanction, is the stigma which is implied in a criminal violation. This Court has indicated that the possibility of stigma, resulting from a state's imposition of a criminal penalty, is an important factor in determining whether a statute should be afforded heightened procedural due process. *In re Winship*, 397 U.S. 358, 363 (1970). The fact a defendant would be "stigmatized by conviction" or the probability that a defendant might lose his "good name" has been found to play a primary role in this Court's determination that a greater level of procedural protection is required. *Id*, 363, 364.

Clearly, the stigma implied in a punitive damage award does not rise, if it exists at all, to the level which it does in a criminal action. A defendant in a punitive action certainly does not lose his "good name," his right to vote, hold public office, or even do business with governmental agencies, as a result of a punitive award, as does an individual convicted of a crime.

In addition, most criminal defendants face consequences which no punitive damage defendants face. For example, most crimes are punishable by imprisonment, a threat never faced by punitive damage defendants. Wheeler, *The Constitutional Case for Reforming Punitive Damages Procedures*, 69 Va. L. Rev. 269, 283-284 (1983). The following have also been articulated as characteristics distinguishing between punitive and criminal sanctions:

> "In addition a prior punitive damages award, unlike a criminal conviction, cannot be used to impeach a person when he testifies in a subsequent

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2d 916, 925 (Ala. 1981) the Alabama Supreme Court recognized that punitive damages "may include mental distress and economic loss."

> trial. Convicted felons may forfeit various civil rights, but punitive damages awards produce no such result. Lawyers can be disbarred from conviction of any of several crimes, but not for an adverse punitive damages judgment. Employers commonly ask whether an applicant has been convicted of a crime, but they do not ask whether punitive damages have been assessed against the applicant. *Id.* at 283-284.

Finally, the civil nature of punitive damages becomes even more clear in light of the fact punitive damages have historically been considered a part of a state's tort law. *Silkwood v. Kerr-McGee*, 104 S.Ct. 615, 625 (1984). In *Silkwood*, this Court ruled on the propriety of a state's punitive damages law, in the analagous context of preemption, finding that a state's punitive damage law should be allowed to apply unless expressly supplanted by federal law.

The State of Alabama, as well as many other states, have pronounced their belief that punitive or exemplary damages are in the public interest. In doing so, they exercise their powers under the Tenth Amendment of the Constitution. Thus, the effect of the appellant's arguments, rather than to prevent constitutional violation, would be to constitute a totally unprecedented and unwarranted interference with states' rights:

Amendment X

> The powers not delegated to the United States by the Constitution nor prohibited by it to the states, are reserved to the states respectively, or to the people.

B. PUNITIVE DAMAGES DEFENDANTS NEED NOT BE AFFORDED ANY HEIGHTENED PROCEDURAL PROTECTIONS

As demonstrated, and contrary to the mischaracterizations of appellants and *amici*, punitive damages are civil and not criminal in nature. Therefore, the procedural due process safeguards afforded in a criminal case are inapplicable. *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689, 716 (1967); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith*, 703 F.2d 1152, 1173 (1981), *cert. den.* 464 U.S. 824 (1983); *Palmer v. A. H. Robbins Company*, 684 P.2d 187, 216-217 (Colo. 1984).

In fact, plaintiffs seeking punitive damages should not be subject to any different constitutional standards than those afforded when awarding compensatory damages. *Curtis Publishing Company v. Butts*, 388 U.S. 130, 160 (1967).

C. EXISTING STATE LAW PROVIDES ADEQUATE DUE PROCESS

Appellants argue that punitive damages cannot be imposed without "fair warning that such damages might be imposed" and in the absence of "articulated substantantive rules of conduct" by which a party can avoid such liability. In addition, appellants and *amici*, in support of appellants, contend there are no meaningful standards for governing the amount of a punitive damage penalty, and, therefore, punitive damages are vague and in violation of the Due Process Clause of the Constitution.

Certainly both individual and corporate defendants are cognizant that their outrageous or reprehensible conduct

will subject them to punitive damages, and, further, that the more egregiously they act in a given situation, the larger the likely punitive damages award will be. Corporate defendants, in particular, are fully aware of the types of actions which will subject them to punitive damage liability.

This awareness is amply demonstrated by the concerted acts of the thirteen associations who have filed the six *amici curiae* briefs in support of appellant in the instant action. Clearly, if appellants and these other organizations were not fully aware of the likely consequences of their wrongful acts, there would not be the concern over the instant action.

Although punitive damages have been attacked through the years as void for vagueness, this Court as well as other courts have uniformly rejected such challenges. *Smith v. Wade*, 461 U.S. 30, 49-51 (1983); *Maheu v. Hughes Tool Company*, 569 F.2d 459 (9th Cir. 1977); *Egan v. Mutual of Omaha Insurance Company*, 24 Cal.3d 809 (1979), *cert.* den., 445 U.S. 912 (1980); *Toole v. Richardson-Merrell, Inc.*, 251 Cal.App.2d 689 (1967); *Fletcher v. Western National*, 10 Cal.App.3d 376 (1970).

In *Smith v. Wade*, 461 U.S. at 56, this Court addressed the issue of whether punitive damages standards were constitutionally too vague, holding that the "recklessness" standard is not too "vague" for a jury to apply in assessing punitive damages. Further, the Court stressed that the focus should be on the defendant's conduct, concluding that if defendant's conduct warranted punitive damages, then it was "appropriate to allow a jury to assess punitive damages." *Id.* at 54. Thus, the *Smith* court not only upheld the standards for assessing punitive damages, but also upheld the right of the jury to *assess* punitive damages. See *Day v. Woodworth*, 54 U.S. (13 HOW.) 362, 371 (1851).

Adequate standards currently exist for both the imposition of punitive damages, as well as the jury's assessment of the specific amount. In this regard, it is important to initially analyze the type of conduct which gives rise to a punitive damage award. Punitive damages are only awarded after a plaintiff has demonstrated that an injury has resulted from the "conscious wrongdoing" of a defendant. *McCormick on Damages*, 280 (West, 1935). Thus, as explained in the *Restatement of The Law of Torts Second*, (1977):

> [T]hese damages can be awarded only for conduct for which this remedy is appropriate — which is to say, conduct involving some element of *outrage* similar to that usually found in crime. The conduct must be *outrageous*, either because the defendant's acts are done with *evil motive*, or because they are done with *reckless indifference* to the rights of others. . . . Reckless indifference to the rights of others and conscious action in deliberate disregard of them . . . may provide the necessary state of mind to justify punitive damages [Section 908, Comment B]. (emphasis added)

See *Smith v. Wade*, 461 U.S. 30, 46-47 (1983) (emphasis added); see California Civil Code § 3294.

Further, the amount of a punitive damage award is generally determined by the jury upon consideration of three criteria: (l) the reprehensibility of defendant's misconduct; (2) a reasonable relationship between the harm caused by the tortfeasor and the quantum of exemplary damage awards; and (3) the wealth of the defendant. See Restatement (Second) of Torts Section 908(2) (1973); *Neal v.*

Farmers Insurance Exchange, 21 Cal.3d 910, 928 (1978); see California Civil Code § 3294.

Appellants and *amici*, on behalf of appellants, contend such standards are "too vague" and "imprecise." Thus, it appears they are asking this Court to find that a state's punitive damages laws must define with some sort of specificity the exact amount or maximum limit of any punitive damage award, in any given action. This argument is erroneous for many reasons. First, as discussed previously, the constitutionality of a jury's power to assess the amount of punitive damages, even absent specific standards, has long been upheld. Moreover, such specific standards for assessment would be virtually impossible to create. Punitive damages serve differing goals of deterrence, regulation, reformation, compensation, and punishment. Thus, to effectively serve these goals, each punitive damage award must be assessed by a jury after carefully weighing the harm caused, the wrongful conduct, and the wealth of the wrongdoer, in light of these general goals.

The guidelines for determining the scope of a punitive damage award cannot be so specific, nor can they be "approached from a jurisprudential perspective divorced from the admonitory function of such verdict; rather [they] should be designed to preserve and strengthen the social desirability of landmark bad faith decisions and exemplary verdicts." Levine, *supra*, at 633. Thus, it would be impossible for a lawmaking body, who has not heard or seen all of the evidence in a particular case, to create a specific standard or set maximum limits on punitive awards which would be fairly applied in an individual case.

What lawmaker could predict the myriad types of "outrageous" misconduct of an individual or corporate

defendant, or the appropriate amount of damages which would act to regulate, punish, and deter that type of conduct? In fact, if a court was required to apply maximum or statutory limits on punitive damages, it is likely that such limits would totally undermine the goals and effects of punitive damages.

Admittedly, the use of statutory maximums or set standards would enable potential defendants to more accurately estimate the internalized costs of their misconduct. In essence, it would allow defendants to evaluate whether, in a particular situation, it would be more cost effective to act "outrageously" or to act within the law. Thus, if as a result of weighing the costs a defendant concluded that the penalty would be more cost effective to bear, a defendant could chose to flagrantly disregard the law and yet, in essence, go unpunished and unregulated. This manifestation of cost analysis phenomena in relation to human life and safety is best reflected in the case of *Grimshaw v. Ford Motor Company*, 119 Cal.App.3d 757 (1981). In *Grimshaw*, the defendant made a calculated financial decision not to recall a deadly defective automobile because the estimated cost to repair would have been $137,000,000.00 versus the $50,000,000.00 estimated cost of paying the injury claims resulting from the defect. (This estimate included the cost of paying claims resulting from the death of the vehicle occupants.) Thus, as this case and others like it demonstrate, in order to preserve the deterrent and regulatory function of punitive damages, it is necessary to leave the power to assess these awards with the jury as it has traditionally been left.

Although the assessment of punitive damage awards is within the jury's discretion, aggressive judicial control over these awards acts as an added procedural safeguard. As

damage award in this case is "excessive" in the constitutional (and common-sense) meaning of that word.

Appellees' excoriation of appellant (and the insurance industry generally), Br., at 40-42, does not aid them in their defense of the constitutionality of this $3,500,000 award. Appellees rely, Br., at 1, on what they term "detailed findings of fact" which were authored by the very Justice of the court below whose objectivity has been drawn into question in this case. Justice Embry, of course, described "dark shadows of fraud and conspiracy," lawlessness and lying throughout his opinion, but he is hardly a neutral source. *See* note 10, *supra.*

Appellees also argue, Br., at 41-42, that an enormous "punitive damage award mitigates the financial incentive which an insurance company has to engage in unreasonable claims practices . . . ." However, appellees depart from the record to make this argument, because there was no proof at trial that the partial denial of appellees' claim was predicated on any financial benefit to appellant. Indeed, the evidence in the record suggests a contrary conclusion.[18]

While appellant may not challenge here the jury's finding that it acted in "bad faith" as a matter of state law,

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[18] The contract of insurance involved in this case was an "experience rated" policy pursuant to which premiums were subject to adjustment upward or downward by appellant based on claims experience under the policy. J.A. 46-48. Such an "experience rated" contract is designed to deal "equitably with large policyholders" by ensuring that premiums are based upon actual claims experience of a policyhloder. Seery, "Types of Health Risk Bearers: Insurance Companies," in *Group Insurance Handbook* 233 (R. Eilers & R. Crowe eds. 1965). As claims paid by an insurance company rise, so do premiums. *Id.* As a matter of common sense, an experience rated policy has the tendency to remove any incentive to engage in the kind of systematic denial of "many valid insurance claims" which appellees, Br., at 42, insinuate to have happened in this case. Indeed, as has been observed, under an experience-rated system insurers have little incentive to control costs of claims believed to be excessive because claims are paid out of the insured's money. A. Enthoven, *Health Plan: The Only Practical Solution to the Soaring Cost of Medical Care* 25-27 (1980).

it is appropriate to point out that this case involves the 23-day hospitalization of a patient whose symptoms her own physician could not substantiate and which he described as having a psychogenic overlay. J.S. App. 4a, 470 So.2d, at 1062. Two experts attested at trial to the reasonableness of appellant's partial denial of the claim under these circumstances. J.S. App. 25a, 470 So.2d, at 1072. Indeed, the conduct for which appellant has been assessed a $3,500,000 fine was conduct which was *not* company policy. J.S. App. 21a, 470 So.2d at 1070. Rather, even as viewed by Justice Embry, it reflected a failure to follow company policy.

Appellees' argument, Br., at 46-49, that the award of punitive damages here should be sustained notwithstanding the fact that the tort of bad faith was not even recognized by Alabama until 1981 is frivolous. Under appellees' submission, appellant should apparently have been on notice of its potential liability in this case on the basis of, *inter alia*, the decision of the Supreme Court of California in *Gruenberg* v. *Aetna Insurance Co.*, 9 Cal.3d 566, 108 Cal. Rptr. 480 (1973).[19] But it is the law of Alabama, enacted by judicial fiat four years after appellant's conduct occurred, under which a grossly excessive fine has been imposed which neither in fact nor theory advances any significant state interest. The law of Alabama in 1977 was clear. There was no tort of bad faith failure to pay an insurance claim. Indeed, in 1976 the court below had ordered a complaint, the allegations of which are indistinguishable from the allegations of the complaint in this case, to be dismissed for failure to state a claim on which relief could be granted. *Old Southern Life Insurance Co.* v. *Woodall*, 295 Ala. 235, 243, 326 So.2d 722, 732 (1976).[20]

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[19] Appellees' statement, Br., at 48, that "Appellant itself was a defendant in *Gruenberg* v. *Aetna Insurance Co.*," is both legally irrelevant and, like other assertions of appellees, *see* notes 8 & 9, *supra*, factually incorrect. *Moody's Bank & Finance Manual* 2610-14, 2804 (1973).

[20] Appellees' attempt, Br., at 46, to rely on *Old Southern* is unjustified. In that case, the Court below ordered the pertinent claim for relief to be

Finally, appellees argue, Br., at 46, that severe punishment administered for conduct which had not been declared to be actionable at the time engaged in is an appropriate and effective deterrent to similar conduct in the future. This argument is erroneous, because deterrence operates prospectively. As pointed out by this Court in *Smith* v. *Wade*, 461 U.S. 30, 50 (1983), the deterrent effect of punitive damages is realized if persons wanting to "avoid lawsuits [may] look to the standard of accountability" in order to guide their conduct. There was, in Alabama, no "standard of accountability" of any kind until 1981 when the court below recognized, for the first time, the possibility of recovery of punitive damages for bad faith failure to pay an insurance claim. As this Court has stated, "we cannot regard as blameworthy those parties who conform their conduct to the prevailing . . . norm." *United States* v. *Peltier*, 422 U.S. 531, 542 (1975). The change in Alabama law wrought by the recognition in 1981 of the tort of bad faith clearly " 'constitut[ed] a sharp break in the line of earlier authority,' " *id.*, at 544, (Brennan, J., dissenting), *quoting Hanover Shoe, Inc.* v. *United Shoe Machinery Corp.*, 392 U.S. 481, 499 (1968); this renders frivolous any argument that the punitive damages award in this case could possibly have achieved any measurable deterrent effect.

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dismissed because it "simply charges that the company committed a tort in maliciously and fraudulently refusing to pay a claim under the policy." *Old Southern Life Insurance Co.* v. *Woodall*, 295 Ala. 235, 243, 362 So.2d 726, 732 (1976).

Respectfully submitted,

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APPENDIX

APPENDIX

ALABAMA RULES OF APPELLATE PROCEDURE

RULE 20

ASSIGNMENT OF ERROR NOT REQUIRED

Assignments of error are not required. Statement of the issues presented on appeal in the appellant's brief as required by Rule 28 shall be sufficient.

Committee Comments

Rule 20 states in positive terms that assignments of error are no longer required. While perhaps unnecessary, inclusion of this statement emphasizes the spirit in which these rules are intended to operate: to reach the merits of litigation.

RULE 40

APPLICATIONS FOR REHEARING

The application for rehearing may be made separately or may be included at the beginning of applicant's brief. All applications for rehearing and the briefs supporting same, must be filed with the clerk of the court within 14 days (2 weeks) after the rendition of the judgment, except that in the case of a pre-trial appeal by the state in a criminal case, any application for rehearing, with the supporting brief, must be filed with the clerk of the court within 7 days (1 week) after the rendition of the judgment. No party can, as a matter of right, apply for a rehearing unless a brief was filed with the clerk as provided by the rules. No brief opposing the application is required, but a brief from the opposing party may be filed within 14 days (2 weeks)—or in the case of a pre-trial appeal by the state in a criminal case, within 7 days (1 week)—after the filing of the original application and brief. No second application for rehearing will be considered unless

the rehearing reversed or substantially modified the original opinion of the court.

(Amended eff. April 1, 1984.)

Committee Comments

This rule is based upon former Supreme Court Rule 17, with certain modifications. References to "terms of court" have been eliminated inasmuch as the court no longer is concerned with such terms.

The rule specifically provides that an applicant for rehearing must file a new brief, and prohibits an application for rehearing by any party who did not submit an original brief. This would ordinarily have application only to an appellee in civil cases, or to both parties in criminal cases.

No answer to an application is permitted in the sense of a pleading. Reply briefs may be filed.

The rule provides for service of the application for rehearing and the accompanying brief in accordance with the general provisions of service in these rules. The former requirement that the application and brief must be physically delivered to the office of the opposing counsel within the former 15-day period is no longer required by this rule.

The rule makes explicit the prohibition against two applications for rehearing by the same party. This would not operate to prevent a party who prevailed in the initial decision and lost on the rehearing from asking for a second rehearing.

It is contemplated that execution of the judgment will be suspended routinely by the court in accordance with this rule.

For a discussion of the minimum standards which a brief in support of an application for rehearing must meet in order to be adequate, see DeGraaf v. State, 34 Ala. App. 137, 37 So.2d 130. See also Rules 31 and 32 for the standards

which briefs in general must meet with respect to form and number. It will be permissible hereunder to combine the application for rehearing and the brief in support thereof.

RULE 44

CONSTITUTIONAL QUESTIONS

(a) *Service.* If the validity of any statute, executive or administrative order, municipal ordinance, franchise or written directive of any governmental officer, agent or body is raised in the appellate court, and the State, municipal corporation or governmental body which enacted or promulgated such questioned order is not a party to the proceeding, the party raising such question shall serve a copy of his written brief, which shall clearly set out the question raised, on the Attorney General, the city attorney, or the chief legal officer of the governmental body whose order is questioned.

(b) *Certificate of Service.* A certificate of service shall be included in the brief of the party raising such question.

(c) *Right to Respond.* The State, municipal corporation, or governmental body shall, within the time allowed for the filing of a response to the brief, be entitled to be heard orally or on brief or both.

(d) *Notice.* Except by special order of the court, in the absence of such notice and certificate, the appellate court will not rule until the notice contemplated by this rule has been given to the appropriate governmental body and the said governmental body or chief legal officer has been given such opportunity to respond as shall be set by the court.

Committee Comments

Rule 44 carries forward the existing requirement that an affected governmental body or the Attorney General as the case may be shall be given notice when the validity of

a statute, ordinance, etc., is drawn in question by a party on an appeal. However, the failure to give notice to such governmental body or to the Attorney General is not fatal, but is an omission which may be supplied in accordance with subdivision (d). Such notice will necessarily occasion a delay to the party raising the question, which is appropriate inasmuch as it is his fault. However, subdivision (d) permits the action to proceed in a case without such notice by special order of the court if the court feels it is urgent or necessary. No time is set by subdivision (d) for the response of the Attorney General or other legal officer as this would be handled on a case by case basis or by order of the court covering this class of cases.

The appearance of the chief legal officer, etc., when the governmental body is not a party to the lawsuit would ordinarily be in accordance with the provisions for briefs of an amicus curiae. There is no requirement that the governmental body respond or enter the case at all if it does not wish to do so. The court may, however, under Rule 29 dealing with briefs of an amicus curiae, request a brief from the governmental body affected.

The term "validity" is intended to be broad enough to encompass the method of enactment as well as form and substance of any ordinance, regulation, state, etc.

The rule has no application when the governmental body is already a party to the litigation. The rule is also broad enough to include not only appeals, but also any extraordinary proceeding before the court. Rule 29 is broadened in this instance to permit oral argument by the affected body whereas oral argument is not ordinarily likely in the event of an ordinary amicus curiae brief.

The provision of subdivision (d) for special order of the court to proceed without notice is not only for emergency situations but also for those instances in which the statute, ordinance, etc., is patently invalid and the court sees no point in requiring briefs from the affected body.